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FILED

DEC 04 2018

ADMINISTRATIVE HEARING BUREAU

**BEFORE THE INSURANCE COMMISSIONER  
OF THE STATE OF CALIFORNIA**

In the Matter of the Appeal of	)	
	)	
<b>A-BRITE BLIND &amp; DRAPERY CLEANING,</b>	)	FILE AHB-WCA-17-26
	)	
Appellant,	)	
	)	
From the Decision of the	)	
	)	
<b>STATE COMPENSATION INSURANCE FUND,</b>	)	
	)	
	)	
Respondent.	)	
_____	)	

**DECISION**

**I. Introduction**

A-Brite Blind & Drapery Cleaning (“Appellant”) brings this appeal against State Compensation Insurance Fund (“SCIF”) in connection with Appellant’s workers’ compensation policy (the “Policy”). The appeal concerns the annual policy periods beginning December 2, 2015 (the “2015 Period”), December 2, 2016 (the “2016 Period”), and December 2, 2017 (the “2017 Period”).

Appellant contends SCIF applied an incorrect rating plan modifier to the 2015 Period and 2016 Period, improperly calculated the premium discount modifier for all three periods, and miscalculated Appellant’s payroll for the 2015 Period. For the reasons discussed below, the

Commissioner finds SCIF misapplied the rating plan modifier but correctly calculated the premium discount modifier. The Commissioner also finds Appellant failed to prove SCIF miscalculated the 2015 Period payroll.

## **II. Issues Presented**

1. Did SCIF apply the correct rating plan modifier during the 2015 Period and 2016 Period, in accordance with SCIF's filings with the California Insurance Commissioner and applicable law?

2. Did SCIF apply the correct premium discount modifier to the Policy for the 2015 Period, the 2016 Period and the 2017 Period, in accordance with SCIF's filings with the Commissioner and applicable law?

3. Did SCIF miscalculate Appellant's payroll for the purposes of determining premium for the 2015 Period?

## **III. Procedural History**

This appeal arises under Insurance Code section 11737, subdivision (f). Appellant initiated the proceedings on August 29, 2017, by filing an appeal from SCIF's July 25, 2017 decision concerning the rating plan modifier and premium discount modifier. On October 6, 2017, Appellant supplemented its appeal by filing copies of its correspondence with SCIF. The California Department of Insurance Administrative Hearing Bureau issued an Appeal Inception Notice on October 10, 2017. SCIF filed its response on October 24, 2017. The Workers' Compensation Insurance Rating Bureau of California ("WCIRB") also filed a response on October 30, 2017, electing not to actively participate in the appeal.

Administrative Law Judge ("ALJ") Clarke de Maigret conducted an evidentiary hearing

in the California Department of Insurance's Los Angeles hearing room on January 16, 2018.<sup>1</sup> Kathleen Newman represented Appellant, and Stefan Janzen, Esq. represented SCIF at the hearing.

Kathleen Newman, one of Appellant's general partners, testified on Appellant's behalf. Keith Mills, an underwriting systems analyst at SCIF, and Marina Montoya, a senior payroll auditor at SCIF, both testified on SCIF's behalf.

The evidentiary record includes the foregoing testimony, SCIF's pre-filed Exhibits 201 through 218, and the ALJ's pre-filed Exhibits 1 and 2, all of which were admitted in evidence at the hearing. It also includes Exhibits 3, 101, 219, and 220, which were introduced and admitted at the hearing. Lastly, the evidentiary record includes Exhibit 102, which Appellant submitted on January 31, 2018 and the ALJ admitted on February 9, 2018. Upon order of the ALJ, certain personal information pertaining to Appellant's employees was redacted from Exhibits 3 and 102, and the unredacted pages were sealed in the administrative record.

At the ALJ's request, SCIF submitted a post-hearing brief on February 6, 2018. The ALJ closed the evidentiary record on February 9, 2018. On March 12, 2018, the ALJ reopened the record and ordered SCIF to provide additional post-hearing briefing and submit further evidence. SCIF filed the additional brief but refused to comply with the ALJ's order to submit the evidence.<sup>2</sup> The ALJ again closed the evidentiary record on March 23, 2018.

On June 15, 2018 a Proposed Decision was submitted to the Insurance Commissioner in this matter. On August 9, 2018, the Commissioner, pursuant to the provisions of 10 CCR

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<sup>1</sup> These proceedings were conducted in accordance with California Code of Regulations, title 10, sections 2509.40 through 2509.78, and the administrative adjudication provisions of the California Administrative Procedure Act referenced in section 2509.57 of those regulations.

<sup>2</sup> The evidence at issue was SCIF's tiering algorithm and related calculations. See the discussion in part V(B)(3) below.

2509.69, chose not to adopt the proposed decision as his decision, but to decide the case upon the record.

#### **IV. Factual Findings**

The Commissioner makes the following findings of fact, based on a preponderance of the evidence in the record.

##### **A. Appellant's Business**

A-Brite Blind and Drapery Cleaning ("A-Brite") is a general partnership, whose partners include Kathleen Newman and her husband, Randall Newman.<sup>3</sup> The Newmans are also the shareholders of a corporation named Firetect, Inc. ("Firetect").<sup>4</sup> Ms. Newman is Firetect's president.<sup>5</sup> The Newmans, as A-Brite's general partners, and Firetect are jointly insured as a single employer under the Policy.<sup>6</sup>

Appellant is in the business of cleaning residential and theatrical blinds and drapery, as well as treating drapery with fire retardant.<sup>7</sup> The business is headquartered in Valencia, Los Angeles County, California, and has been in operation for 30 years.<sup>8</sup>

##### **B. Appellant's Policy and Claims History**

SCIF has provided workers' compensation insurance to Appellant for about the last 20 years.<sup>9</sup> The Policy at issue in this case renewed on December 2, 2015, 2016 and 2017, the starting dates of the 2015 Period, 2016 Period, and 2017 Period, respectively.<sup>10</sup> For those

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<sup>3</sup> Transcript of Proceedings on January 16, 2018 ("Tr.") at 25:10-26:3.

<sup>4</sup> Tr. 26:18-25.

<sup>5</sup> Tr. 27:22-23.

<sup>6</sup> Evidentiary Hearing Exhibit ("Exh.") 208 at 208-1. Throughout this Proposed Decision, the term "Appellant" refers to A-Brite and Firetect jointly, except where otherwise required by the context.

<sup>7</sup> Tr. 26:4-17.

<sup>8</sup> Tr. 25:1-4.

<sup>9</sup> Tr. 38:11-14; Exh. 219.

<sup>10</sup> Tr. 10:3-18; Exh. 208 at 208-1; Exh. 218 at 218-1.

periods, Appellant dealt directly with SCIF and did not use an insurance broker.<sup>11</sup>

During the 20 years it has been insured by SCIF, Appellant received a single workers' compensation claim.<sup>12</sup> That claim resulted from a bruise sustained by one of Appellant's employees on September 10, 2015.<sup>13</sup> SCIF initially reserved \$24,000 to cover the estimated losses and expenses.<sup>14</sup> However, the claim closed on November 6, 2015 with substantially lower total combined losses and expenses of \$819, which SCIF paid.<sup>15</sup>

### **C. Determination of Premium under the Policy**

The Policy provides that Appellant's premiums are determined by SCIF's "manuals of rules, rates, rating plans and classifications."<sup>16</sup> SCIF's manuals and rating plans include several modifiers, which affected Appellant's premium.<sup>17</sup>

#### **1. Rating Plan Modifier**

SCIF determined the premiums for the 2015 Period and 2016 Period in part based on a "rating plan modifier."<sup>18</sup> SCIF applied the rating plan modifier to Appellant's "standard premium" to arrive at a "modified premium."<sup>19</sup> The rating plan modifier resulted from multiplying four components, namely, (a) a "territory modifier," based on geographical area, (b) a "claims free" modifier, for policyholders with claims below a certain level, (c) a "direct placement" modifier for policyholders who deal with SCIF directly rather than through a

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<sup>11</sup> Tr. 37:23-24, 38:5-7; Exh. 206; Exh. 215.

<sup>12</sup> Tr. 28:21-29:11; Exh. 3 at 3-3 through 3-6.

<sup>13</sup> Exh. 201 at 201-1.

<sup>14</sup> Exh. 1 at 1-40.

<sup>15</sup> Tr. 65:8-9; Exh. 201 at 201-1.

<sup>16</sup> Exh. 209 at 209-4 [Part Five, § A].

<sup>17</sup> Exh. 1; Exh. 2.

<sup>18</sup> Exh. 210 at 210-1; Exh. 218 at 218-2.

<sup>19</sup> Exh. 212 at 212-1. In Appellant's case, standard premium is equal to base premium, which is calculated by multiplying Appellant's workers' compensation payroll in each employment classification by SCIF's base rate for the respective classification. (*Ibid.*)

broker, and (d) a “tier modifier,” based on a rating tier assigned according to a “tier score” calculated using an algorithm.<sup>20</sup> These modifiers are typically expressed as numerical coefficients. For example, a modifier of 0.80 reduces premium by 20 percent, while a modifier of 1.20 increases it by 20 percent.

**a. Territory Modifier**

In the 2015 Period and 2016 Period, SCIF applied a territory modifier of 1.15 to the Policy<sup>21</sup>. SCIF’s rate filings with the Commissioner included a 1.15 territory modifier for Los Angeles County, effective April 1, 2015.<sup>22</sup>

**b. Claims Free Modifier**

During the 2015 Period, SCIF applied a 10 percent “claims free” credit to the Policy (*i.e.*, a modifier of 0.90).<sup>23</sup> For unclear reasons, SCIF did not apply the credit to the 2016 period.<sup>24</sup> Under SCIF’s rate filings effective during those periods, the credit was applicable to policyholders continuously insured with SCIF who incurred no more than \$1,000 in workers’ compensation claims during the three years preceding the policy period (or two years for policyholders with less than \$10,000 in annual base premium).<sup>25</sup>

**c. Direct Placement Modifier**

SCIF applied a three percent “direct placement” credit (0.97 modifier) to the Policy

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<sup>20</sup> Tr. 58:14-59:8. See also Tr. 15:3-17:18 regarding trade secret privilege claimed by SCIF in the algorithm.

<sup>21</sup> Exh. 206 at 206-3; Exh. 215 at 215-3.

<sup>22</sup> Exh. 1 at 1-9, 1-27.

<sup>23</sup> Exh. 206 at 206-3; Exh. 208 at 208-2.

<sup>24</sup> Exh. 215 at 215-3; Exh. 218 at 218-2.

<sup>25</sup> Exh. 1 at 1-4; Exh. 2 at 2-1.

for both the 2015 Period and 2016 Period.<sup>26</sup> A 2011 SCIF rate filing with the Commissioner describes this three percent credit.<sup>27</sup>

**d. Rating Tier Modifier**

SCIF assigns policyholders to various “rating tiers,” each with its own modifier.<sup>28</sup> SCIF assigns tiers based on “tier scores.”<sup>29</sup> Tier scores are calculated by SCIF using software it alternately refers to as the rating engine, tiering engine, scoring engine, or quote engine.<sup>30</sup> SCIF treats the tiering algorithm as a closely-guarded secret and does not allow it to be viewed by customers, members of the public, or even SCIF’s own underwriting staff.<sup>31</sup> SCIF does not indicate tier scores on its policies, quotes or billing statements; nor does it provide customers with any calculations showing how the scores are calculated, even if customers specifically request that information.<sup>32</sup> The algorithm is not included in any of SCIF’s rate filings with the Commissioner.<sup>33</sup>

The algorithm takes into account the policyholder’s prospective estimated premium, payroll and number of employees.<sup>34</sup> It also factors in three years of the policyholder’s historical premium and loss data.<sup>35</sup> That data includes the frequency and number of workers’ compensation claims and whether those claims involved medical expenses or compensation for

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<sup>26</sup> Exh. 206 at 206-3; Exh. 208 at 208-2; Exh. 215 at 215-3; Exh. 218 at 218-2.

<sup>27</sup> Exh. 1 at 1-1; Exh. 2 at 2-2.

<sup>28</sup> Tr. 56:10-17; Exh. 1 at 1-26; Exh. 2 at 2-27.

<sup>29</sup> Tr. 74:22-75:2.

<sup>30</sup> Tr. 62:24, 65:19-21; 74:20-25.

<sup>31</sup> Tr. 14:22-17:18; Tr. 74:20-75:13; See also SCIF Letter to ALJ renewing objection, dated February 1, 2018.

<sup>32</sup> Tr. 97:3-21, 101-3; 102-17; Exh. 101; Exh. 205; Exh. 208.

<sup>33</sup> See Exh. 1, Exh. 2.

<sup>34</sup> Tr. 57:8-11.

<sup>35</sup> Tr. 57:11-13, 83:10-19.

lost employee time or disability.<sup>36</sup>

Each rating tier has an associated modifier.<sup>37</sup> Starting in 2013 and through the commencement of the 2015 Period, SCIF employed a rating framework with four tiers, A through D.<sup>38</sup> In the year preceding the 2015 Period, Appellant was assigned to Tier B, which at the time had a rating tier modifier of 0.951.<sup>39</sup>

SCIF revised its tier rating framework for the 2015 Period.<sup>40</sup> Tier A received a modifier of 0.65. Tier B was assigned a modifier of 1.0. Tier C received a factor of 1.5, and tier D was assigned a modifier of 2.0.<sup>41</sup>

In the 2015 Period, Tier D applied to tier scores of at least 0.30092.<sup>42</sup> Using its secret algorithm, SCIF initially calculated Appellant's tier score as 0.419525161.<sup>43</sup> Consequently, SCIF moved Appellant from Tier B to Tier D, thereby doubling Appellant's premium.<sup>44</sup> The tier score increase resulting in Appellant's move to Tier D was precipitated by the lone workers' compensation claim in 2015, for which SCIF initially reserved \$24,000 in estimated losses and expenses.<sup>45</sup> SCIF notified Appellant of the tier change and premium increase in a renewal quote dated October 5, 2015.<sup>46</sup> Nothing in the record or in SCIF's rate filings explains how Appellant's tier scores were calculated.

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<sup>36</sup> Tr. 57:15-25.

<sup>37</sup> Tr. 56:10-17; 58:12-17; Exh. 1 at 1-26; Exh. 2 at 2-33, 2-34.

<sup>38</sup> Tr. 56:18; Exh. 1 at 1-26.

<sup>39</sup> Tr. 59:11-12.

<sup>40</sup> Tr. 59:21-24; Exh. 1 at 1-26.

<sup>41</sup> *Ibid.*

<sup>42</sup> *Ibid.*

<sup>43</sup> Exh. 1 at 1-39.

<sup>44</sup> Tr. 61:5-6.

<sup>45</sup> Tr. 61:5-64:10; Exh. 1 at 1-40.

<sup>46</sup> Exh. 205 at 205-3.



Appellant complained to SCIF about the increase,<sup>47</sup> which resulted in SCIF recalculating the tier score and reassigning Appellant to Tier C on January 25, 2016, with a tier modifier of 1.5.<sup>48</sup> The sole factor lowering Appellant's tier score from the Tier D range to the Tier C range was SCIF's entry into the scoring engine of \$819 in actual losses and expenses for the 2015 claim rather than the \$24,000 that was originally estimated.<sup>49</sup> In contrast, if Appellant had incurred no workers' compensation claims in the three years prior to the 2015 Period, SCIF would have assigned Appellant to Tier B with a modifier of 1.0.<sup>50</sup>

Starting in the 2016 Period, SCIF increased the number of rating tiers to a numerical system ranging from four to seven.<sup>51</sup> SCIF continued to maintain that its algorithm was confidential and did not include it in its rate filings with the Commissioner. For policyholders with standard premium between \$10,000 and \$25,000, the new Tier 3 had a modifier of 1.0, which would have no impact on premium. And Tier 4 had a factor of 1.2, which would increase standard premium by 20 percent.<sup>52</sup> SCIF assigned Appellant to Tier 4 for the 2016 Period.<sup>53</sup> If Appellant had incurred no workers' compensation claims in the three prior years, SCIF would have assigned Appellant to Tier 3.<sup>54</sup>

In other words, the lone \$819 claim in a 20-year period resulted in a 50 percent (or \$6,971) increase to Appellant's premium for the 2015 Period and a 20 percent (or estimated \$1,834) increase for the 2016 Period.<sup>55</sup>

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<sup>47</sup> Exh. 3 at 3-7.

<sup>48</sup> Tr. 33:12-23, 64:11-65:16; Exh. 3 at 3-30.

<sup>49</sup> Tr. 64:21-65:21; Exh. 1 at 1-36 through 1-41.

<sup>50</sup> Tr. 105:21-106:14.

<sup>51</sup> Tr. 72:12-14; Exh. 2 at 2-27.

<sup>52</sup> Tr. 93:6-14; Exh. 2 at 2-27.

<sup>53</sup> Tr. 72:7-11; Exh. 2 at 2-39.

<sup>54</sup> Tr. 106:15-107:3.

<sup>55</sup> Exh. 212 at 212-1; Exh. 215 at 215-3.

## **2. Premium Discount Modifier**

Appellant's premiums for each of the 2015 Period, 2016 Period and 2017 Period were calculated in part using a "premium discount modifier."<sup>56</sup> That modifier applied a flat discount of 11.3% to all modified premium over \$5,000.<sup>57</sup> SCIF's 2011 rate filings with the Commissioner describe that discount.<sup>58</sup>

### **D. Policy Audit**

On March 27, 2017, SCIF conducted an audit for the 2015 Period.<sup>59</sup> The audit found Appellant's workers' compensation payroll was \$188,995. Based on that audit, SCIF determined that Appellant incurred a base premium of \$13,942.87, a modified premium of \$20,996.99,<sup>60</sup> a total premium of \$19,189.36,<sup>61</sup> mandatory surcharges of \$629.83, and total charges of \$19,819.19.<sup>62</sup>

### **V. Discussion**

Appellant argues SCIF's rating plan modifiers and premium discount modifiers were incorrectly applied.<sup>63</sup> Appellant further contends SCIF miscalculated Appellant's 2015 Period payroll. SCIF argues all of the modifiers were valid and correctly applied.<sup>64</sup> SCIF also stands behind its audit and further asserts the Commissioner may lack jurisdiction to determine the payroll calculation issue.<sup>65</sup> For the reasons discussed below, the Commissioner finds that (1)

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<sup>56</sup> Tr. 71:6-72:6; Exh. 210 at 210-1; Exh. 218 at 218-2.

<sup>57</sup> Tr. 71:6-16; Exh. 210 at 210-1; Exh. 218 at 218-2.

<sup>58</sup> Exh. 1 at 1-2, 1-3.

<sup>59</sup> Tr. 115:14-25; Exh. 211 at 211-1.

<sup>60</sup> Obtained by multiplying the base premium by a rating plan modifier of 1.50593. (Exh. 212 at 212-1.)

<sup>61</sup> Obtained by multiplying the modified premium by a premium discount modifier of 0.91391. (*Ibid.*)

<sup>62</sup> Obtained by adding the total premium and the mandatory surcharges. (*Id.* at 212-1, 212-2.)

<sup>63</sup> Appeal dated August 25, 2017 ("Appeal").

<sup>64</sup> SCIF's Response to the Appeal, dated October 18, 2017, at 3-4.

<sup>65</sup> Letter from SCIF to the ALJ, dated February 9, 2018.

the Commissioner has jurisdiction over all issues in this appeal, (2) SCIF misapplied the rating plan modifier, (3) SCIF correctly applied the premium discount modifier, and (4) Appellant failed to meet its burden of proof to show SCIF miscalculated Appellant's payroll.

**A. The Commissioner Has Jurisdiction over This Appeal**

**1. Applicable Law**

**a. The Statutory Rate Filing Scheme**

California has an "open rating" workers' compensation regulatory system, in which each insurer sets its own rates and files them with the Commissioner. This framework is intended to curtail monopolistic and discriminatory pricing practices, ensure carriers charge rates adequate to cover their losses and expenses, and provide public access to rate information so that employers may find coverage at the best competitive rates.<sup>66</sup>

Insurance Code section 11735 lays out the statutory filing requirements. Subdivision (a) of that section provides in part, "Every insurer shall file with the commissioner all rates and supplementary rate information that are to be used in this state. The rates and supplementary rate information shall be filed not later than 30 days prior to the effective date." The term "rate" means "the cost of insurance per exposure base unit," subject to certain limitations.<sup>67</sup> And "supplementary rate information" means "any manual or plan of rates, classification system, rating schedule, minimum premium, policy fee, rating rule, rating plan, and any other similar information needed to determine the applicable premium for an insured."<sup>68</sup>

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<sup>66</sup> See generally Ins. Code §§ 11730-11742.

<sup>67</sup> Ins. Code § 11730, subd. (g). Rates exclude the application of individual risk variations based on loss or expense considerations, as well as minimum premiums.

<sup>68</sup> Ins. Code § 11730, subd. (j).

## **b. Jurisdiction over Private Party Appeals**

Insurance Code section 11737, subdivision (f), confers jurisdiction on the Commissioner to hear and decide private party appeals concerning the application of insurers' section 11735 filings. Specifically, the statute provides in pertinent part:

Every insurer... shall provide within this state reasonable means whereby any person aggrieved by the application of its filings may be heard by the insurer... on written request to review the manner in which the rating system has been applied in connection with the insurance afforded or offered. ... Any party affected by the action of the insurer... on the request may appeal... to the commissioner, who after a hearing ... may affirm, modify, or reverse that action.

## **2. Analysis**

Appellant asserts SCIF failed to correctly apply the rates and supplementary rate information filed under Insurance Code section 11735. Specifically, Appellant contends SCIF misapplied its filed rating plan modifiers and premium discount modifiers to SCIF's filed rates. Appellant further contends SCIF miscalculated Appellant's 2015 Period payroll. If true, that would result in the application of SCIF's filed rates to the wrong exposure level. Appellant requested that SCIF remedy these issues. SCIF rejected that request, and Appellant timely filed this appeal.<sup>69</sup> Because the issues on appeal concern the manner in which SCIF applied its rating system to the Policy, the Commissioner has jurisdiction under Insurance Code section 11737, subdivision (f).

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<sup>69</sup> See Cal. Code Regs., tit. 10, § 2509.46 ["An appeal is timely if it is filed either within 30 days after rejection of a Complaint and Request for Action or rejection of review thereof . . . "]. California Code of Regulations, title 10, section 2509.42, subdivision (q) provides in part, "Service by first class mail . . . is complete at the time of deposit with the carrier, but any . . . right or duty to do any act or make any response within any prescribed period of notice . . . shall be extended for a period of five days." SCIF mailed its rejection of Appellant's complaint and request for action on July 25, 2017 (See Appeal). Appellant filed this appeal within the 35 day window on August 29, 2017. (*Ibid.*)

**B. Use of the Tier Modifier Resulted in a Misapplication of SCIF's Filed Rates.**

SCIF's rating plan modifier consists of four components, one of which is the tier modifier. For the reasons discussed below, the tier modifier is an improper adjustment to SCIF's filed rates.

**1. SCIF Misapplied its Filed Rates Due to its Use of an Unfiled Tiering Algorithm.**

SCIF uses a proprietary algorithm to calculate the tier modifier. SCIF contends it is not legally required to file the algorithm with the Commissioner, and that use of the unfiled algorithm to determine Appellant's premium was lawful. The Commissioner disagrees.

**a. Applicable Law**

Insurance Code section 11735, subdivision (a), requires insurers to file all rates and supplementary rate information, without exception, before using them in California. The term "supplementary rate information" includes any "minimum premium, policy fee, rating rule, rating plan, and any other similar *information needed to determine the applicable premium for an insured.*"<sup>70</sup> "[M]oney paid by an insured to an insurer for coverage constitutes premium regardless of its name."<sup>71</sup> Thus, any information necessary to determine amounts owed by an insured to its insurer is supplementary rate information. If SCIF wished to apply its Tiering algorithm to Appellant's rate, it was required to file the algorithm and allow it to be subject to public inspection under Insurance Code section 11735.

Insurers may only charge premium in accordance with their filed rates and

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<sup>70</sup> Ins. Code § 11730, subd. (j), emphasis added.

<sup>71</sup> *In the Matter of the Appeal of Shasta Linen Supply, Inc.* (Cal. Ins. Comm'r, June 22, 2016, AHB-WCA-14-31) (*Shasta Linen*) at 48-49; see also *Troyk v. Farmers Group Inc.* (2009) 171 Cal.App.4th 1305, 1325 ["[I]nsurance premium includes not only the 'net premium,' or actuarial cost of the risk covered (i.e. expected amount of claims payments), but also the direct and indirect costs associated with providing that insurance coverage and any profit or additional assessment charged."]

supplementary rate information.<sup>72</sup> As the Commissioner determined in his precedential decision *In the Matter of the Appeal of Shasta Linen Supply, Inc.*, an insurer's use of unfiled rates or supplementary rate information is unlawful.<sup>73</sup> That is true regardless of whether the Commissioner first disapproved the unfiled rates under Insurance Code section 11737.<sup>74</sup>

**b. Analysis**

**i. The Tiering Algorithm Constitutes Supplementary Rate Information.**

SCIF determined Appellant's premiums for the 2015 Period and 2016 Period in part based on a "rating plan modifier"<sup>75</sup> that increased Appellant's premium.<sup>76</sup> The rating plan modifier resulted from multiplying four component modifiers, including a "tier modifier." Tier modifiers, in turn, are tied to "rating tiers" assigned to policyholders based on "tier scores" that SCIF calculates using an algorithm that SCIF claims is proprietary. The algorithm takes account of the policyholder's prospective estimated premium, payroll and number of employees,<sup>77</sup> as well as the policyholder's historical premium and loss data.<sup>78</sup> There is no way for the policyholder or anyone else to calculate a tier score without the algorithm. Without the

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<sup>72</sup> Ins. Code § 11735, subd. (a); Ins. Code § 11730, subd. (j); See *Appeal of Gary E. Milne* (Cal. Ins. Comm'r Feb. 19, 1999, AHB-WCA-97-11) at 10 ["[I]nsurers do not have unrestricted discretion to set workers' compensation insurance rate levels under open rating. The open rating system contemplates competitive pricing consistent with the public interest in fair and adequate insurance."]

<sup>73</sup> *Shasta Linen* at 52. *Shasta Linen* was designated precedential under Gov. Code section 11425.60, subdivision (b).

<sup>74</sup> See *Ibid.*

<sup>75</sup> Exh. 210 at 210-1; Exh. 218 at 218-2.

<sup>76</sup> Exh. 212 at 212-1. In Appellant's case, standard premium is equal to base premium, which is calculated by multiplying Appellant's workers' compensation payroll in each USRP classification by SCIF's base rate for the respective classification. (*Ibid.*)

<sup>77</sup> Tr. 57:8-11.

<sup>78</sup> Tr. 57:11-13.

tier score, it is impossible to determine which rating tier applies, and which tier modifier to assign the policyholder. Since a policyholder's base premium during the 2015 Period, for example, could have been reduced by as much 45 percent or increased by up to 100 percent depending on the rating tier, it is not possible to determine premium without the algorithm.<sup>79</sup> Because the algorithm is a key component of the rate calculation, it constitutes "information needed to determine the applicable premium for an insured[,]" thereby satisfying the definition of "supplementary rate information" under Insurance Code section 11730, subdivision (j).<sup>80</sup>

**ii. SCIF's Use of the Unfiled Algorithm Was Unlawful, Contravened Public Policy, and Misapplied SCIF's Filed Rates.**

Insurers must file all supplementary rate information under Insurance Code section 11735, subdivision (a), and under subdivision (b), which requires that information be publicly available. But SCIF withheld the algorithm—a critical piece of information that determines policyholders' rates—based on its assertion that "any policyholder (or future policyholder) can potentially 'game the system' if the algorithm was known to them" and that other insurers "could, conceivably, use knowledge of the algorithm to gain a competitive advantage over State Fund[.]"<sup>81</sup> SCIF's position ignores the mandate of the statute and frustrates the public policy concerns behind it.

Among the policy aims of section 11735, two important goals of the public inspection

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<sup>79</sup> Exh. 1 at 1-26.

<sup>80</sup> Without the algorithm, it is impossible for the Commissioner to determine whether the applied rates tend to create a monopoly in the market, are inadequate or unfairly discriminatory. (See Ins. Code §§ 11732, 11732.5, 11737, subd. (b), (c).)

<sup>81</sup> Letter from State Fund to the ALJ, dated February 1, 2018, objecting to disclosure of the algorithm. In fact, SCIF violated the ALJ's order to submit a copy of the algorithm in this appeal. (See SCIF's Amended Objection to Order Vacating Evidentiary Ruling; Order to Disclose Tiering Algorithm, dated March 22, 2018 ("Obj. to Order to Disclose").)

provisions are to enable employers to obtain coverage at the best rates and to curtail monopolistic pricing practices.<sup>82</sup> When rate information is transparent, policyholders are better able to compare coverage and reduce their costs. Transparency reduces the likelihood that insurers will gain a monopolistic advantage when all carriers' pricing information is public.

In furtherance of those aims, the Legislature passed Insurance Code section 11742 to mandate the establishment of an online rate comparison guide. Subdivision (a) of that section provides:

The Legislature finds and declares that the insolvencies of more than a dozen workers' compensation insurance carriers have seriously constricted the market and lead to a dangerous increase in business at the State Compensation Insurance Fund. Yet more than 200 insurance companies are still licensed to offer workers' compensation insurance in California. Unfortunately, many employers do not know which carriers are offering coverage, and it is both difficult and time consuming to try to get information on rates and coverages from competing insurance companies. A central information source would help employers find the required coverage at the best competitive rates.

When insurers use secret unfiled formulas to modify their filed rates, they directly frustrate the Legislature's intent behind the comparison guide and section 11735's public inspection provisions. Rate disclosure confers little value if the public does not have access to the formulas carriers use to modify their rates. Meaningful price comparison is simply impossible without those formulas.

By hiding its algorithm, SCIF obscured Appellant's looming premium increase until Appellant was in no position to avoid it. Appellant's witness testified, "I could not fathom what a negative monetary impact it would have on our small business to have a claim after over 20 years in business. One claim for \$819.... When I received the final renewal for 2015, I was

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<sup>82</sup> See generally Ins. Code §§ 11730-11742.



shocked.”<sup>83</sup> If Appellant or its advisors had access to the algorithm, they could have determined in advance the claim’s impact on premium and potentially mitigated the effects. At a minimum, Appellant would have had additional time to shop for a less expensive policy.

Insurance Code section 11735 and the legislative policy behind it required that SCIF file the algorithm as supplementary rate information. SCIF failed to do so, rendering its use of the unfiled algorithm unlawful. By effectively increasing SCIF’s filed rates by 50 percent for the 2015 Period and 20 percent for the 2016 Period, SCIF’s use of the algorithm resulted in the misapplication of those rates.

**2. SCIF Wrongly Asserts it Complied with the Commissioner’s Regulations, Thus Fulfilling the Statutory Filing Requirements.**

SCIF argues it complied with the Commissioner’s rate filing regulations and in so doing satisfied Insurance Code section 11735’s filing requirements. Specifically, SCIF asserts that the Commissioner has authority under the regulations to determine what constitutes supplementary rate information. SCIF asserts that the Commissioner’s acceptance of its rate filing without the tiering algorithm *ipso facto* constituted a determination that the algorithm was not supplementary rate information. Therefore, SCIF contends that the algorithm did not need to be filed under section 11735.<sup>84</sup> SCIF’s interpretation of the rate filing process and regulations is wrong.

**a. Applicable Law**

In addition to complying with the statutory filing requirements under Insurance Code section 11735, workers’ compensation insurers must file their rates in accordance with

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<sup>83</sup> Tr. at 29:8-25.

<sup>84</sup> Obj. to Order to Disclose at 4-6.

California Code of Regulations, title 10, sections 2509.30 *et seq.* Section 2509.32, subdivision (e), which provides:

A complete rate filing is one for which the insurer has completed the Filing Form and submitted all necessary attachments and exhibits. Necessary attachments and exhibits are those materials that, together with the Filing Form, are sufficient to enable the Commissioner to determine the rates the insurer would charge its insureds. Unless the Commissioner notifies the insurer within 30 days of the filing date that its rate filing is incomplete, the rate filing will be considered complete.

#### **b. Analysis**

SCIF did not comply with the regulations, which broadly set forth the information that is required in an insurer's rate filing—insurers must file *all* information that is necessary to determine an insurer's rates, which would encompass SCIF's algorithm. The statute does not give the Commissioner the power to exclude information in violation of the statute's language that all such information must be filed.

The regulation provides further clarification of Insurance Code section 11735, subdivision (b)'s requirement that "[r]ates filed pursuant to this section shall be filed in the form and manner prescribed by the commissioner." Section 2509.32, subdivision (e), does not suggest that an insurer's failure to file supplemental information relieves it from its obligation to comply with statutory law; indeed, the regulation expressly mandates that insurers file information "sufficient to enable the Commissioner to determine the rates the insurer would charge its insureds." The regulation is consistent with the statute, which broadly defines the term "supplementary rate information" to include "minimum premium, policy fee, rating rule, rating plan, and any other similar information needed to determine the applicable premium for an insured." Indisputably, if SCIF intended to use the algorithm to modify its rates, the algorithm would be necessary determine SCIF's rates. Since SCIF's algorithm falls squarely within the statutory and regulatory

definitions, SCIF was required file it. SCIF knew that its rate filing was not complete because SCIF knew the algorithm is necessary “to enable the Commissioner to determine the rates the insurer would charge its insureds.” Section 2509.32(e) does not purport to allow insurers to avoid the filing requirements that are specified in Insurance Code section 11735 under any circumstance. Rather, it provides the form and manner of compliance and reiterates the provisions in the statute.

SCIF cites no basis to support its assertion that it need not comply with statutory and regulatory law so long as the Commissioner accepted its filing as complete. SCIF seems to confuse the Commissioner’s acceptance of its filing with the Commissioner’s limited power to disapprove rates under certain narrowly-tailored circumstances, if he determines that the premiums charged, in the aggregate, would be inadequate to cover an insurer’s losses and expenses, unfairly discriminatory, or tend to create a monopoly in the market.<sup>85</sup> While applicable law grants the Commissioner authority to reject a rate filing if an insurer fails to comply with the filing requirements or if the filing is incomplete,<sup>86</sup> the Commissioner lacks the authority to override a statutory mandate that insurers file all supplemental rate information. The Commissioner’s determination that a filing is complete is a ministerial function to determine whether the paperwork includes the Filing Form, exhibits and attachments necessary to comprise a complete filing as defined in Title 10 California Code of Regulations section 2509.32(e). The Commissioner’s acceptance of SCIF’s rate filing as complete is not a substantive endorsement that SCIF has met its statutory obligation to file all of supplementary rate information that it uses to calculate an insured’s premium, such as the unfiled algorithm. Whatever else may be said of the legal importance of an administrative action to deem a filing

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<sup>85</sup> Ins. Code § 11737(b).

<sup>86</sup> Tit. 10, Cal. Code Regs. § 2509.32(c).

complete, the scope of such action cannot serve to protect formulae an insurer withholds from its filing, and then applies outside of the filing process to calculate a policyholder's applicable premium.<sup>87</sup>

Moreover, SCIF's failure to file its algorithm undermined an additional purpose of the statute that required it to file its algorithm, preventing A-Brite's ability to access crucial information that greatly affected its workers' compensation insurance rates.

SCIF's argument also overlooks section 11735's important public policy consideration in requiring that pricing information be publicly available to assist employers shopping for coverage. Given this policy, as well as section 11730's broad definition of "supplementary rate information," and section 11735's express requirement that insurers file *all* of that information before using it, an insurer's failure to file such information would frustrate the public's statutory right to access that information. The Commissioner's acceptance of SCIF's rate filing as complete does not relieve SCIF from its responsibility to file its supplementary information as required by law. More to the point, SCIF's failure to file the supplementary information cannot inure to the prejudice of A-Brite. SCIF unlawfully misapplied its rates by modifying them with an unfiled algorithm. The Commissioner will not affirm its use of the unfiled algorithm to A-Brite's prejudice.

### **3. Trade Secret Privilege Did Not Exempt the Algorithm from Statutory Filing and Disclosure Requirements.**

SCIF argues that even if the tiering algorithm is supplementary rate information, it

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<sup>87</sup> (See, e.g., *State Compensation Ins. Fund v. Superior Court* (2001) 24 Cal.4<sup>th</sup> 930 [insurer's misallocation of expenses which were reported to WCIRB, thereby resulting in higher premiums for insured, is not conduct immune from civil liability]; accord *Donabedian v. Mercury Ins. Co.* (2004) 116 Cal.App.4<sup>th</sup> 968, 992-93 [11 Cal.Rptr.3d 45, 62] ["It is possible for an insurance carrier to file with the Department a rate filing and class plan that satisf[y] all of the ratemaking components of the regulations, and still result in a violation of the Insurance Code *as applied*." (emphasis in original)]; see also *MacKay v. Superior Court* (2010) 188 Cal.App.4<sup>th</sup> 1427, 1450 [115 Cal.Rptr.3d 893, 911], as modified (Oct. 20, 2010) ["...underlying conduct challenged was not the charging of an approved rate, but the application of an unapproved underwriting guideline..."].)

remains protected from disclosure under the trade secret privilege.<sup>88</sup> Specifically, SCIF contends that because section 11735 does not expressly override the subsequently enacted trade secret protections of Government Code section 6254, section 11735 does not require the filing and public disclosure of trade secrets. The Commissioner is not persuaded.

**a. Applicable Law**

Civil Code section 3426.1 defines a “trade secret” as information that “(1) [d]erives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use; and [¶] (2) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.”

Evidence Code section 1060 provides: “If he or his agent or employee claims the privilege, the owner of a trade secret has a privilege to refuse to disclose the secret, and to prevent another from disclosing it, if the allowance of the privilege will not tend to conceal fraud or otherwise work injustice.” Like the rest of the Evidence Code, that section applies to court actions.<sup>89</sup> It has no applicability to administrative or other governmental proceedings unless expressly invoked by statute or regulation.<sup>90</sup>

Government Code section 6254 exempts certain trade secrets from the disclosure requirements of the California Public Records Act.<sup>91</sup> In particular, subdivision (ab) of that section states the act does not require disclosure of “[t]he following records of the State Compensation Insurance Fund:”

(3) Records related to the impressions, opinions,

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<sup>88</sup> Obj. to Order to Disclose at 6-8.

<sup>89</sup> Evid. Code § 300.

<sup>90</sup> 31 Cal.Jur.3d Evidence, § 7; see also *Big Creek Lumber Co. v. County of San Mateo* (1995) 31 Cal.App.4th 418, 430 fn. 16.

<sup>91</sup> Cal. Gov. Code § 6250 et seq.

recommendations, meeting minutes of meetings or sessions that are lawfully closed to the public, research, work product, theories, or strategy of the fund or its staff, on the development of rates, contracting strategy, underwriting, or competitive strategy pursuant to the powers granted to the fund [under the Insurance Code].

...

(5)(A) Records that are trade secrets pursuant to... [Evidence Code section 1060], including without limitation, instructions, advice, or training provided by the State Compensation Insurance Fund to its board members, officers, and employees regarding the fund's special investigation unit, internal audit unit, and informational security, marketing, rating, pricing, underwriting, claims handling, audits, and collections.

In addition, section 6254, subdivision (k) exempts the following information from the Public Records Act's disclosure requirements: "Records, the disclosure of which is exempted or prohibited pursuant to federal or state law, including, but not limited to, provisions of the Evidence Code relating to privilege."

#### **b. Analysis**

Trade secret privilege does not limit section 11735's public inspection requirements. The California Supreme Court's analysis and holding in *State Farm Mutual Automobile Insurance Co. v. Garamendi*<sup>92</sup> are instructive. That case concerned Insurance Code section 1861.07, which broadly requires public disclosure of "[a]ll information provided to the commissioner" in connection with insurance rate approval applications (unrelated to workers' compensation). The plaintiff insurance company argued Government Code section 6254's trade secret provisions limited section 1861.07's disclosure requirements. Specifically, the plaintiff contended that since section 1861.07 expressly excludes a specific subdivision of section 6254, the Legislature implicitly intended all other subdivisions to apply, including

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<sup>92</sup> *State Farm Mut. Automobile Ins. Co. v. Garamendi* (2004) 32 Cal.4<sup>th</sup> 1029.

those that exempt trade secrets from disclosure. The Court disagreed, holding that the public disclosure rule covering “[a]ll information provided to the commissioner” under section 1861.07 is absolute.<sup>93</sup> That section’s exclusion of the specific provision of section 6254 “merely buttresses this rule.”<sup>94</sup> Thus, the Court concluded that information provided to the commissioner under section 1861.07 was not subject to trade secret privilege under section 6254 or, by extension, Evidence Code section 1060.<sup>95</sup>

Insurance Code section 11735’s public disclosure requirement is similarly absolute. The statute requires the filing of “all rates and supplementary rate information that are to be used in this state” and “[a]ll rates, supplementary rate information, and any supporting information for rates filed under this article, as soon as filed, shall be open to public inspection at any reasonable time...”<sup>96</sup>

Finally, contrary to SCIF’s assertions,<sup>97</sup> it is immaterial that Government Code section 6254 was enacted after Insurance Code section 11735. Section 6254 limits public disclosure obligations under the Public Records Act, so the Public Records Act cannot reasonably be construed to limit the Insurance Commissioner’s review and acceptance of supplementary rate information under the Insurance Code. Specifically, the lead-in to section 6254 states that “this chapter does not require the disclosure” of the information exempted pursuant to that section. And “this chapter” refers to Government Code, division 7, chapter 3.5, *i.e.*, the Public Records Act. A plain reading of the Public Records Act limits its application to the chapter within the

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<sup>93</sup> Id. at 1042-1043, emphasis in original.

<sup>94</sup> Id. at 1042.

<sup>95</sup> Id. at 1047. As noted above, privilege under Evidence Code section 1060 is incorporated by reference in Government Code section 6254, subdivision (k).

<sup>96</sup> Emphasis added.

<sup>97</sup> Obj. to Order to Disclose at 7.

Government Code, and is plainly inapplicable to the construction of the Insurance Code and workers' compensation insurance rate filing requirements concerning the Insurance Commissioner. Because a plain reading of Government Code section 6254 and Insurance Code section 11735 demonstrates two separate and independent areas of authority, the order in which they were enacted is of no consequence here.

For these reasons, the trade secret privilege does not exempt the tiering algorithm from Insurance Code section 11735's filing and public inspection provisions.

**4. SCIF Must Exclude The Unfiled Tier Modifier in Computing Appellant's Rates.**

Section 11737, subdivision (f), grants the Commissioner broad authority to award remedies in workers' compensation appeals. The statute authorizes him to "affirm, modify, or reverse" an insurer's action concerning the application of its rating system. The statute contains no language restricting remedies the Commissioner may order to modify or reverse an insurer's action. Nor has any California court inferred such restrictions from the statute. Indeed, the breadth of the Commissioner's authority is consistent with his comprehensive role to "require from every insurer a full compliance with all the provisions of [the Insurance Code]."<sup>98</sup>

SCIF failed to apply the correct rate to the policy by unlawfully applying the unfiled rating tier modifier component for the 2015 Period and 2016 Period. SCIF must recalculate the rates for those Periods without applying the unfiled rating tier modifier.

**C. The Claims Free Modifier Applies to Both the 2015 Period and the 2016 Period.**

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<sup>98</sup> Ins. Code § 12926.



The Commissioner finds SCIF correctly applied a claims-free modifier to the 2015 Period but improperly failed to apply that modifier to the 2016 Period.

Under a SCIF rate filing that was in effect during the 2015 Period and 2016 Period, a claims-free modifier of 0.90 applied to policyholders continuously insured with SCIF and incurring no more than \$1,000 in workers' compensation claims during the three years preceding the current policy period (or two years for policyholders with less than \$10,000 in annual base premium).<sup>99</sup> In the three years preceding the 2015 Period, Appellant was continuously insured with SCIF and incurred no workers' compensation claims. Accordingly, SCIF correctly applied the claims free modifier to the Policy for that period.<sup>100</sup>

However, SCIF did not apply the modifier to the 2016 Period.<sup>101</sup> In September of 2015, Appellant incurred a single workers' compensation claim, which was closed on November 6, 2015. The total losses and expenses incurred in connection with that claim were \$819.<sup>102</sup> Thus, Appellant incurred less than \$1,000 in claims in the three years preceding the beginning of the 2016 Period. Accordingly, SCIF should have applied the 0.90 claims-free modifier to that period as well.

#### **D. SCIF Correctly Calculated the Remaining Modifiers.**

The Commissioner finds the remaining components of the rating plan modifier—i.e., the direct placement modifier and the territory modifier—were correctly applied for the 2015 Period and the 2016 Period. Appellant contends the premium discount modifier was incorrectly calculated for all three periods at issue. The Commissioner disagrees.

##### **1. Direct Placement Modifier**

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<sup>99</sup> Exh. 1 at 1-4; Exh. 2 at 2-1.

<sup>100</sup> Exh. 206 at 206-3; Exh. 208 at 208-2.

<sup>101</sup> Exh. 215 at 215-3; Exh. 218 at 218-2.

<sup>102</sup> Tr. 65:8-9; Exh. 201 at 201-1.

A SCIF rate filing applicable to both the 2015 Period and 2016 Period states SCIF “will provide a 3% credit to employers who obtain their policy without engaging a broker.”<sup>103</sup> Appellant did not engage a broker but instead dealt directly with SCIF to procure coverage for those periods. SCIF therefore correctly included the three percent credit (i.e., a modifier of 0.97) within the rating plan modifier it applied to the Policy for both the 2015 Period and 2016 Period.<sup>104</sup>

## **2. Territory Modifier**

SCIF’s rate filings applicable to the 2015 Period and 2016 Period required it to apply a territory modifier of 1.15 to customers in Los Angeles County.<sup>105</sup> Appellant is located in that county. Therefore, SCIF correctly included that territory modifier within the Policy’s rating plan modifier during both the 2015 Period and the 2016 Period.<sup>106</sup>

## **3. Premium Discount Modifier**

SCIF’s rate filings require a premium discount of 11.3 percent for all modified premium over \$5,000 and no discount for the first \$5,000.<sup>107</sup> SCIF correctly applied the discount to Appellant’s actual modified premium for the 2015 Period, and to Appellant’s estimated modified premiums for the 2016 Period and 2017 Period.<sup>108</sup> However, because Appellant’s modified premiums must be recalculated using the correct rating plan modifier in accordance with part V (B) above, SCIF must re-compute the premium discount calculations

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<sup>103</sup> Exh. 1 at 1-1; Exh. 2 at 2-2.

<sup>104</sup> Exh. 206 at 206-3; Exh. 208 at 208-2; Exh. 215 at 215-3; Exh. 218 at 218-2.

<sup>105</sup> Exh. 1 at 1-9, 1-27 [effective April 1, 2015]; Exh. 2 [no changes to territory modifiers from prior year].

<sup>106</sup> Exh. 206 at 206-3; Exh. 215 at 215-3.

<sup>107</sup> Exh 1 at 1-2, 1-3.

<sup>108</sup> Tr. 71:6-72:6; Exh. 210 at 210-1; Exh. 218 at 218-2.

using the revised modified premiums.<sup>109</sup>

**E. Appellant Failed to Demonstrate SCIF Miscalculated Appellant's 2015 Period Payroll.**

Appellant asserts SCIF miscalculated Appellant's 2015 Period payroll. The Commissioner finds Appellant has failed to meet its burden of proof on this issue.

**1. Applicable Law**

Under California Code of Regulations, title 10, section 2509.61, "[a] party has the burden of proof as to each fact the existence or non-existence of which is essential to the claim for relief or defense that he or she is asserting." As in an ordinary civil court action, that burden includes both the initial burden of going forward and the burden of persuasion by a preponderance of the evidence.<sup>110</sup>

**2. Analysis**

SCIF produced a final payroll audit report for the 2015 Period, indicating Appellant's workers' compensation payroll for the entire period was \$188,995.<sup>111</sup> Appellant contests the accuracy of the report and produced its own payroll summary for that period, asserting a total workers' compensation payroll of \$180,890.44.<sup>112</sup> Appellant thereby met its initial burden of going forward.

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<sup>109</sup> For example, Appellant's actual base premium for the 2015 Period was \$13,942.87. (Exh. 212 at 212-1.) The correct rating plan modifier in accordance with part V(B) above is 1.00395 (i.e., 1.15 territory modifier x 0.90 claims free modifier x 0.97 direct placement modifier). Multiplying the base premium by that rating plan modifier yields a modified premium of \$13,997.94 (i.e., 1.00395 x \$13,942.87). Thus, the premium discount modifier for the 2015 Period is:  $1 - ((\$13,997.94 - \$5,000) \times 0.113) \div \$13,997.94 = 0.927363$ .

<sup>110</sup> *McCoy v. Board of Retirement* (1986) 183 Cal.App.3d 1044, 1051 fn. 5.

<sup>111</sup> Exh. 211 at 211-5.

<sup>112</sup> Exh. 3 at 3-47 through 3-51.

However, Appellant's payroll summary contains inaccuracies. Specifically, it does not entirely coincide with the 2015 Period, which began on December 2, 2015 and ended on December 2, 2016. The workers' compensation payroll for that period should cover the work performed by Appellant's employees between those dates.<sup>113</sup> But Appellant's payroll summary sets forth the payments made during that period, rather than the amounts earned. The summary does not include any activity after the payments on November 25, 2016,<sup>114</sup> which were for the work period ending November 20, 2016.<sup>115</sup> Appellant's summary therefore failed to include payroll earned during the last 11 days of the 2015 Period. If Appellant had included those days, its payroll total would likely have closely matched SCIF's.<sup>116</sup>

Because Appellant's payroll summary is inaccurate and incomplete, Appellant failed to meet its burden of persuasion to establish SCIF incorrectly calculated the 2015 Period payroll.

#### **F. Conclusions of Law**

Based on the foregoing facts and analysis, the Commissioner concludes as follows:

1. SCIF failed to apply the correct rating plan modifier to the Policy during the 2015 Period and 2016 Period, in accordance with SCIF's filings with the Commissioner and applicable law. The rating plan modifier is incorrect for two reasons. First, SCIF included an unlawful and unenforceable rating tier modifier component during both the 2015 Period and 2016 Period. Second, SCIF failed to properly include a claims free modifier component for the

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<sup>113</sup> Cal. Code Regs., tit. 10, § 2318.6, Part 3, Section V, Rule 1 [payroll includes amounts "earned during the policy period"].

<sup>114</sup> Exh. 3 at 3-47 through 3-50.

<sup>115</sup> See, e.g., Exh. 102 at 102-88.

<sup>116</sup> Using Appellant's payroll total and assuming relatively steady work periods, one would expect the payroll for the full year to be approximately as follows:  $\$180,890.44 \div [(365 \text{ days} - 11 \text{ days}) \div 365 \text{ days}] = \$186,511.33$ . That figure is much closer to the audit total, suggesting SCIF's payroll calculation is more accurate than Appellant's.

2016 Period.

2. SCIF correctly included a territory modifier component and direct placement modifier component in the rating plan modifier during both the 2015 Period and 2016 Period, in accordance with SCIF's rate filings.

3. The correct rating plan modifier for both the 2015 Period and 2016 Period comprises three components: a territory modifier of 1.15, a claims free modifier of 0.90, and a direct placement modifier of 0.97. Accordingly, SCIF must apply the following rating plan modifier to each of those periods:  $1.15 \times 0.90 \times 0.97 = 1.00395$ .

4. SCIF used the correct premium discounts to the Policy for the 2015 Period, the 2016 Period, and the 2017 Period, in accordance with SCIF's filings with the Commissioner and applicable law. SCIF applied premium discount modifiers to each of those policy periods at the rate of 11.3 percent on all modified premium over \$5,000, which was consistent with SCIF's rate filings with the Commissioner under Insurance Code section 11735, subdivision (a). However, SCIF must recalculate the premium discount modifier to reflect the correct rating plan modifier's effect on modified premium.

5. Appellant failed to meet its burden of proof to establish SCIF miscalculated Appellant's payroll for the purposes of determining premium for the 2015 Period.

### **ORDER**

1. SCIF shall recalculate Appellant's premium for the 2015 Policy Period and 2016 Policy Period in accordance with this decision and submit a revised premium calculation and statement of account for those periods to Appellant within 30 days after the date this decision is adopted.

2. It is further ordered that the entirety of this Decision is designated precedential pursuant to Government Code section 11425.60, subdivision (b).

Dated: November 16, 2018

  
DAVE JONES  
Insurance Commissioner

## DECLARATION OF SERVICE BY MAIL

Case Name/No.: In the Matter of the Appeal of:  
A-BRITE BLIND & DRAPERY CLEANING,  
File AHB-WCA-17-26

I, CANDACE GOODALE, declare that:

I am employed in the County of Sacramento, California. I am over the age of 18 years and not a party to this action. My business address is State of California, Department of Insurance, Executive Office, 300 Capitol Mall, Suite 1700, Sacramento, California, 95814.

I am readily familiar with the business practices of the Sacramento Office of the California Department of Insurance for collection and processing of correspondence for mailing with the United States Postal Service. Said ordinary business practice is that correspondence is deposited with the United States Postal Service that same day in Sacramento, California.

☒ On November 16, 2018 following ordinary business practices, I caused a true and correct copy of the following document(s):

**ORDER ADOPTING PROPOSED DECISION; PROPOSED DECISION; and  
NOTICE OF THE LIMITS FOR RECONSIDERATION & JUDICIAL  
REVIEW**

to be placed for collection and mailing at the office of the California Department of Insurance at 300 Capitol Mall, Sacramento, California, 95814 with proper postage prepaid, in a sealed envelope(s) addressed as follows:

(SEE ATTACHED SERVICE LIST)

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Sacramento, California, on November 16, 2018.

  
CANDACE GOODALE

## **CORRECTED DECLARATION OF SERVICE BY MAIL**

Case Name/No.: In the Matter of the Appeal of:  
A-BRITE BLIND & DRAPERY CLEANING,  
File AHB-WCA-17-26

I, CANDACE GOODALE, declare that:

I am employed in the County of Sacramento, California. I am over the age of 18 years and not a party to this action. My business address is State of California, Department of Insurance, Executive Office, 300 Capitol Mall, Suite 1700, Sacramento, California, 95814.

I am readily familiar with the business practices of the Sacramento Office of the California Department of Insurance for collection and processing of correspondence for mailing with the United States Postal Service. Said ordinary business practice is that correspondence is deposited with the United States Postal Service that same day in Sacramento, California.


☒ On November 16, 2018 following ordinary business practices, I caused a true and correct copy of the following document(s):

### **DECISION; NOTICE OF TIME LIMITS FOR RECONSIDERATION & JUDICIAL REVIEW**

to be placed for collection and mailing at the office of the California Department of Insurance at 300 Capitol Mall, Sacramento, California, 95814 with proper postage prepaid, in a sealed envelope(s) addressed as follows:

(SEE ATTACHED SERVICE LIST)

I declare under penalty of perjury that the foregoing is true and correct, and that this declaration was executed at Sacramento, California, on November 16, 2018.

  
CANDACE GOODALE